

A Hungarian Judge Seeks Protection from the CJEU – Part I

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2019-07-28T08:30:04

For the first time, a Hungarian judge stayed proceedings to [ask the CJEU preliminary questions](#) about the independence of Hungarian courts. The questions concern the appointment of court presidents and the low salary of judges. The response of Hungarian authorities was quick: Within a week, the Prosecutor General requested the *Kúria* (Hungary's Supreme Court) to review the reference with the possible effect of deterring other judges from asking similar questions. This first post will analyse the preliminary questions, while the second post will illustrate the emerging constitutional crisis within the Hungarian judiciary.

The Hungarian Government has long been criticised for undermining judicial independence. [Domestic actors](#), the [European Parliament](#), the [GRECO](#), the [Venice Commission](#) and many others have continuously expressed concerns over the threats to judicial independence since 2012, when a new system of court administration was introduced in Hungary with centralised powers for one person, the President of the National Judicial Office (NJO), Ms Tünde Handó. The NJO President has broad powers over, among others, the recruitment and promotion of judges, budgeting and training. The NJO President must be a judge, but otherwise she is an external actor to the judiciary. She is fully dependent on the legislative branch, while the judiciary has no practical means to control her: she was elected by Parliament for nine years without hearing the opinion of the Judicial Council, she has to report to Parliament and, if she abuses her powers, only the Parliament may remove her.

Criticism has increased in the last one and a half years since the newly elected members of the National Judicial Council, the Hungarian judiciary's self-governing body, pledged to scrutinize Ms Handó's activity more thoroughly (see more in Part II). In short, since 2018, the Judicial Council has issued [several reports](#) detailing the long list of legal provisions the NJO President has violated. In turn, the NJO President declared the Judicial Council 'illegitimate', declined to cooperate, and initiated attacks against the Council and its members. For example, Ms Handó labelled Council members as "*traitors of the homeland*" for informing international partners, such as the European Networks of Councils for the Judiciary on the situation. She also declined to grant access to documents and blocked payments of the Council (which she could do because the Judicial Council does not have a budget of its own and is financially dependent on the NJO which it is supposed to control). After the Council signalled the problems a number of times to the NJO President and to the public without result, on 8 May 2019 the Judicial Council [requested](#) Parliament to remove the NJO President for not complying with her statutory obligations. The pro-government majority, however, protected Ms Handó and turned down the request without debate and without refuting the Council's claims. Altogether, the Parliament spent [three minutes](#) on the issue.

The clash of the NJO President and the Judicial Council has raised concern across Europe: this year's country-specific [recommendations](#) of the Council within the European Semester noted that “[t]he National Judicial Council faces increasing challenges in counter-balancing the powers of the President of the National Office for the Judiciary. Questions have been raised regarding the consequences of this for judicial independence.” The European Association of Judges [described](#) the situation more bluntly by saying that “[i]n general, one can say that the Hungarian Judiciary is facing a kind of ‘constitutional crisis’”, while Thomas Markert, Secretary of the Venice Commission [stated](#) that from a rule of law viewpoint, the powers of the President of the National Judicial Office are “*the most problematic*” in Hungary.

Judicial self-governance

Mr Csaba Vasvári, who is a member of the National Judicial Council referred three questions to the CJEU in his order of 11 July 2019. A Swedish national allegedly misused ammunition in Hungary in 2015, and charges were brought against him. The first preliminary question is about the human rights aspects of the case and addresses the lack of an effective quality assurance system for translations and interpretation and relates to [Directive 2010/64/EU](#). The issue is of crucial importance from the point of view of safeguarding the fairness of criminal procedures, but it is not related to judicial independence, therefore it is not detailed here.

The second question challenges the powers of the NJO President: the referring judge asks whether it is acceptable under EU law that court presidents are appointed in a manner that circumvents the provision prescribing a vote by judges on the candidates, which should be taken into account by the NJO President. Selecting court presidents is a strong power of the NJO President, because court presidents have broad authority: court presidents evaluate the work of judges which determine the progress of their careers; they are entitled to launch disciplinary proceedings; and court presidents influence the everyday working conditions of individual judges, such as the number of assistants. Court presidents can also influence the fate of individual cases as they issue the case allocation scheme of the court, and court leaders dependent on the court president determine which case goes to which judge. This is extremely important because there is no automatic case allocation in Hungary which makes allocating cases an effective method to indirectly influence the outcome, [as an expert noted](#). In some cases, certain powers extend to lower courts: the referring court, the Central District Court of Pest (Budapest), for example, belongs to the Metropolitan Court (Budapest), and the latter's president has wide powers over the judges of the referring court.

The general rules for appointing a court president include a vote by the judges of the specific court and the NJO President can only appoint someone if he or she is supported by the majority of judges. If the NJO President wishes to appoint an applicant not supported by the judges, she must seek the consent of the National Judicial Council. This is a method to secure judges' participation in the selection process. The problem is that the NJO President has the power to annul the entire call and render the appointment procedure unsuccessful without the consent of any judicial body, and in this case she might appoint an interim court president

for up to one year. At the Metropolitan Court, where the requesting court belongs, the NJO President rendered the last three calls unsuccessful and as a result the court has had no permanent president since January 2018. The National Judicial Council found that the NJO President violated the law with the practice of repeatedly annulling – often without any proper justification – calls for applications where the result of the judicial vote on candidates was not to her liking.

The essence of the question is thus whether a judge can be deemed independent if a court president is appointed by disregarding the vote of the judges when this president has wide powers. The case is also interesting because the referring judge himself was one of the judges who had applied for a higher position but the NJO President rendered the call unsuccessful without reasons. Moreover, the former interim president of the Metropolitan Court, appointed by the NJO President, initiated disciplinary proceedings against Judge Vasvári. The National Judicial Council did not give its consent which is necessary for a procedure against its members. Also, the current interim president joined an open letter of court presidents in which they called on all members of the National Judicial Council [to resign](#).

The salary of judges

The third question relates to the remuneration of judges and asks the CJEU to determine whether the salary of Hungarian judges is high enough to guarantee independence. Unlike in the [ASJP](#) or the [Carlos Escribano Vindel](#) cases, there was no direct cut of the judges' salary in Hungary, instead there has not been a raise for fifteen years which has led to a low level of judges' income compared to the average wage. While in 2004 the basic pay for judges was 2.09 times higher than the average pay, in 2019 the ratio is only 1.23. The preliminary reference argues that inflation and the general development of the economy together with the lack of a general raise has resulted in a comparatively low level of salary for judges.

The first interesting aspect of the question is that to compensate for the low basic pay, extra payments can be granted by the NJO President and by court presidents selected by her. The amounts of these extra payments are significant for a judge, on average they equal several months' pay in a year. The National Judicial Council strongly criticised this practice of bonuses and payments for project work, because these are discretionary and non-transparent payments and thus undermine judicial independence: without an adequate basic pay, judges cannot feel secure to decide against the assumed will of their superiors. A second interesting aspect of the reference is that it argues that since September 2018, prosecutors have been earning more than judges, a sharp change because for a long time the salary of the two groups moved together. In *ASJP* and *Carlos Escribano Vindel*, the CJEU accepted salary reduction for judges in part because these were general measures in the public administration. As for Hungary, the referring judge argues, the raise for prosecutors serves as an example to the comparatively low level of judicial wage. The reference cites the Prime Minister's Chief of Staff who said this year that the salary of judges was 'derogatory' and there were plans to increase judicial pay as of 2020. However, there is still no legislation tabled on the topic and next year's budget proposal does not suggest a raise for judges. This is highly problematic as

by keeping judicial salaries at such a low level, the executive and legislative branch acquires a very strong ‘blackmailing’ potential over the judiciary.

The Prosecutor General challenges the questions

Just a week after the preliminary reference was initiated, on 19 July 2019, the Prosecutor General [announced](#) that he requested a review of the preliminary reference order. The special appeal used by the Prosecutor General is only available for him and he tries to acquire a declaration from the *Kúria* that the preliminary reference is unlawful. This will not stop the reference from reaching Luxembourg but might have a chilling effect among judges because of the high prestige of the *Kúria*. The Prosecutor General argues that none of the questions raise genuine issues: the first question is not important because in the specific case there was no problem relating to translation or interpretation. As to the second and third questions regarding the abuse of powers by the NJO President in appointments and the salary of judges, the Prosecutor General suggests that these are irrelevant for the case at hand. It is important to note that the Prosecutor General is a close [ally](#) of Prime Minister Viktor Orbán, and he [honoured](#) Ms Handó, the NJO President, with the “*Pro Cooperation*” (For Cooperation) award only this June. The CJEU has a [long list](#) of judgments emphasising that every judge has the right to submit preliminary questions and superior national courts [cannot deprive](#) inferior courts from this right, but if the *Kúria* agrees with the Prosecutor General, the chilling effect might be significant and deter other judges from submitting questions to the CJEU on judicial independence.

The second and third questions on judicial independence might seem remote from the actual case but the judge argues that if the independence of Hungarian courts is undermined, the defendant might challenge any decision before international fora. The judge also claims that there is no permanent and lawfully appointed president of the higher court where he belongs, and the interim president has wide powers to influence judges, including him, while the low salary undermines the independence of all Hungarian judges and courts.

